

Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Criminal Procedure: a Defense and Appreciation

Sanford Jay Rosen

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Sanford J. Rosen, *Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Criminal Procedure: a Defense and Appreciation*, 27 Md. L. Rev. 103 (1967)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol27/iss2/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME XXVII

SPRING 1967

NUMBER 2

© Copyright Maryland Law Review, Inc., 1967

CONTEMPORARY WINDS AND CURRENTS IN CRIMINAL LAW, WITH SPECIAL REFERENCE TO CONSTITUTIONAL CRIMINAL PROCEDURE: A DEFENSE AND APPRECIATION†

By SANFORD JAY ROSEN*

It is likely that in all ages men have considered their own to be most interesting.¹ However, at least ostensibly, ours, more than many, is an age of excitement and of re-examination and re-dedication. Passing even the great revolutions in the sciences and technology — those, for example, in energy development and use, communications, cybernation, medicine, and space exploration — in social affairs, too, ours is a revolutionary age. Sufficient illustration of this observation is found in the burgeoning, in scarcely more than a decade, of the Civil Rights Revolution, the Ecumenical Movement, and the War on Poverty. While the success of these and numerous other social movements and currents can be mooted, most people, at least most of those in the literary or library set, consider the hallmark of the present to be change and disruption. In the criminal law, and especially criminal procedure, this kind of movement, much of which seems significant, is particularly obvious.

To many, the recent developments in criminal law are cause for alarm, and numerous well-meaning lawyers and judges in this state have argued strenuously against them. The Supreme Court and its decisions deepening constitutional protections in the criminal area and applying these protections against the states have been subjected to particularly powerful criticism.² Unfortunately, the present Court is a

† I am indebted to my colleague, Edward A. Tomlinson, for reading and criticizing this article and to James J. Hanks, Jr. of the Law School's class of 1967 for assisting me in preparing its footnotes.

* Associate Professor of Law, University of Maryland.

1. Compare TEILHARD DE CHARDIN, *THE PHENOMENON OF MAN* 212 (1959): "In every epoch man has thought himself at a 'turning point of history.'"

2. See, e.g., Eney, *Changing Concepts of Criminal Justice*, 69 *TRANSACTIONS OF THE MD. STATE BAR ASS'N* 496 (1964); Northrup, *The Supreme Court and Criminal Procedure*, 26 *MD. L. REV.* 1 (1966); Ansel, *Report of Foreman of Grand Jury* 154 (September Term 1964), *The Daily Record* (Baltimore), Jan. 11, 1965, at 2, col. 1 (quoting from a charge to the Grand Jury from Judge Charles Harris of the Baltimore Supreme Bench). Cf., e.g., *Truitt v. Board of Public Works*, 243 Md. 375, 412, 221

ready target, for lately it has been especially willing to overturn its own precedents in the area and too often by the slimmest of five to four margins.³ It is my primary purpose to undertake in this article a broad defense of the Court and its recent decisions, for while I share some of the concern, for example, that the new federalization of criminal justice sacrifices vitality that may come with diversity and experimentation, in the main, I approve of the new winds.

THE QUEST FOR THE MEANING OF DUE PROCESS

Often pursuant to federal constitutional requirements, our criminal law, especially its procedural but also its substantive aspects, has become increasingly sensitive of late to "humane" limitations on governmental power. A notable aspect of this general trend has been the ever-accelerating tendency to apply to state criminal law systems the constitutional protections and prohibitions that heretofore were applied only to federal criminal law. This federalization of state criminal law is predominantly a phenomenon of the last decade or so,⁴ for in 1833 the Supreme Court had ruled that the guarantees of the Bill of Rights, which establish most of our constitutional limitations on criminal procedure, protect individuals only from the federal government and not from state and local governments.⁵ The recent constitutional limitations on state criminal proceedings have been, of course, imposed pursuant to the fourteenth amendment which provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.* . . ."⁶ It is particularly through interpretation of the due process clause of this amendment, and lately the equal protection clause as well, that the Supreme Court has been imposing far-reaching strictures upon state criminal proceedings.

Over the years, four significant interpretations of the fourteenth amendment's due process clause, as it bears upon criminal law and procedure, have been promoted by various members of the Supreme

A.2d 370, 392 (1966) (Barnes, J., concurring); *but cf.*, e.g., Marbury, *Address of the President*, 71 TRANSACTIONS OF THE MD. STATE BAR ASS'N, No. 2, at 129 (1966).

3. See, e.g., Eney, *supra* note 2. Of course, many of the most fundamental of the "new" decisions have been unanimous, at least as to result, or supported by more than five of the Justices. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966) (newspaper publicity and fair trial, eight to one); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation, unanimous as to result); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel, unanimous as to result).

4. In this connection it is worth remembering that the first time the Supreme Court even assumed that free speech guarantees, such as found in the first amendment, were limitations upon the states was in 1925 in the case of Gitlow v. New York, 268 U.S. 652 (1925). In addition, even on the federal level, active application of guarantees, arising from the Bill of Rights, to the realm of criminal law is comparatively recent. See, e.g., Johnson v. Zerbst, 304 U.S. 458 (1938) (sixth amendment includes the right of federal indigent defendants to be furnished counsel at trial); Weeks v. United States, 232 U.S. 383 (1914) (exclusion of the fruits of unreasonable searches and seizures).

5. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

6. U.S. Consr. amend. XIV. (Emphasis added.)

Court and others.⁷ Until recently, the prevailing view of the fourteenth amendment's due process clause was that it should be interpreted and applied "by the gradual process of judicial inclusion and exclusion."⁸ As Justice Cardozo viewed the process, in *Palko v. Connecticut*,⁹ the protections afforded by the fourteenth amendment's due process clause are too complex to tame or describe for all time. As a starting, but certainly not an ending point for interpretation, however, Justice Cardozo believed that the due process clause should be read to impose on the states at least some version of the "immunities that are valid as against the federal government by force of the specific pledges of particular amendments [among the first eight] and which have been found to be implicit in the concept of ordered liberty. . . ." ¹⁰ Under this view, individual rights (whether enumerated in the Bill of Rights or not), which are "not of the very essence of a scheme of ordered liberty," ¹¹ are not protected by the fourteenth amendment against state intrusion. However,

we reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.¹²

Thus, according to Justice Cardozo, the states are prohibited from violating "those 'fundamental principles of liberty and justice [again whether enumerated in the Bill of Rights or not] that lie at the base of all our civil and political institutions,' " ¹³ such as freedom of speech and the right not to be condemned without a fair trial or hearing. This so-called "ordered liberty" concept was subsequently reformulated by Justice Frankfurter in *Adamson v. California*.¹⁴ According to him:

[The Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict

7. Before these are formulated (in simplified fashion), it is advisable to dispose of a fifth interpretation, one which would limit the words "due process of law" to such processes as are actually provided by law. Obviously, this is the very minimum that the words might be taken to mean. I know of no Supreme Court Justice who has placed this minimal gloss upon the fourteenth amendment; certainly none appears to have done so in the Twentieth Century.

In an early case involving the fifth amendment's due process clause, in fact, the Court said that: "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

8. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877); see also *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

9. 302 U.S. 319 (1937).

10. *Id.* at 324-25.

11. *Id.* at 325.

12. *Id.* at 326.

13. *Id.* at 328.

14. 332 U.S. 46 (1947) (Frankfurter, J., concurring).

the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. . . . Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [appealed from] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.¹⁵

It was also in the *Adamson* case that Justice Black, joined by Justice Douglas, vehemently dissented from the step-by-step "ordered liberty" interpretation.¹⁶ In Justice Black's opinion, the "ordered liberty" concept left the Justices too much at large to impose their own views, periodically expanding and contracting the protective content of due process;¹⁷ moreover, Justice Black insisted that the actual or ascertainable purpose of the fourteenth amendment was to incorporate and impose upon the states the first eight amendments and whatever protections they hold, *in toto*. Thus, the Black view is characterized as the "incorporation" theory.

To be distinguished from the "incorporation" theory is what might be labeled the "incorporation plus" theory, which describes the position originally adopted by Justices Murphy and Rutledge. Generally accepting "incorporation," they insisted, however, that additional flexibility was contemplated in the due process clause to take account of the "Occasions [that] may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of due process despite absence of a specific provision in the Bill of Rights."¹⁸ More recently, Justice Douglas has, on increasing occasion, parted company with Justice Black as to the meaning of various protections found among the first eight amendments,¹⁹ and, in essence, may have also adopted the "incorpora-

15. *Id.* at 66-67. See also *Rochin v. California*, 342 U.S. 165 (1952); *Wolf v. Colorado*, 338 U.S. 25 (1949); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). Justice Harlan is now the main advocate of this view. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring in the result); *Malloy v. Hogan*, 378 U.S. 1, 14-33 (1964) (Harlan and Clark, J.J., dissenting).

16. 332 U.S. at 71-75. (Black, J., dissenting). See also, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting). Compare Justice Black's reading, in *Adamson*, of the relevant "history" of the fourteenth amendment, with Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

17. Notably, Justice Black has never really explained the scope or meaning to be given to the fifth amendment's due process clause which, of course, would be incorporated into the fourteenth amendment under his approach. See SUTHERLAND, CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS 530-31 (1965); but see *United States v. Wade*, 35 U.S.L. WEEK 4597, 4606-07 (U.S. June 12, 1967) (Black, J., concurring in part, dissenting in part).

18. *Adamson v. California*, 332 U.S. 46, 124 (1947) (Murphy and Rutledge, J.J., dissenting).

19. See, e.g., *Ker v. California*, 374 U.S. 23 (1963) (what constitutes an unreasonable search and seizure?).

tion plus" position by finding the necessary flexibility in the ninth amendment²⁰ and in the "penumbras" of other amendments and constitutional provisions that deal with personal liberty.²¹

The fourth approach to the meaning of "due process of law" occupies a position somewhat between that of the "incorporation" and "ordered liberty" theories. Articulated primarily by Justice Brennan, but also accepted by, among others, Chief Justice Warren and former Justice Goldberg,²² it has been denominated the "absorption" or "selective incorporation" theory. Like the modern "ordered liberty" concept, it claims its origins in Justice Cardozo's decision in *Palko v. Connecticut*.²³ By means of the "process of absorption, the [Supreme] Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the [due process clause of the] Fourteenth Amendment,"²⁴ while the less important guarantees in the first eight amendments are excluded; for example, the seventh amendment's guarantee of jury trials in all civil cases involving more than twenty dollars. Under this approach, a right absorbed from one of the first eight amendments necessarily comes with its full sweep and vigor into the fourteenth amendment and is enforced against the states according to essentially the same standards as it is enforced against the federal government.²⁵

The "absorption" theory assures somewhat more certainty than the "ordered liberty" theory while avoiding some of the inflexible and inconvenient results of the "incorporation" theory. It differs from "ordered liberty" in that some of the guarantees in the first eight amendments are applied, as such, against the states; it differs from "incorporation" in that not all of those guarantees are so applied. In another respect "absorption" has greater similarity to "ordered liberty," or at least to "incorporation plus," than to "incorporation," for it does not exclude the possibility that there may be an essence of the due process clause of the fourteenth amendment that is independent of the guarantees expressly stated in the first eight amendments.²⁶

20. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

21. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

22. See *Pointer v. Texas*, 380 U.S. 400, 410 (1965) (Goldberg, J., concurring); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Cohen v. Hurley*, 366 U.S. 117, 154-60 (1961); Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963).

23. 302 U.S. 319 (1937).

24. *Pointer v. Texas*, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring).

25. See *Pointer v. Texas*, 380 U.S. 400, 410 (1965) (Goldberg, J., concurring); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Ker v. California*, 374 U.S. 23 (1963). See also *Chapman v. California*, 386 U.S. 18 (1967). (When federal constitutional rights are involved, a federal and not the state test of harmless error applies.) The advocates of the "ordered liberty" approach insist that even when a right found among the first eight amendments is to be protected against state infringement, the states are not necessarily bound by the same standards for assuring the right as is the federal government. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring in the result; sixth amendment right to confrontation); *Ker v. California*, 374 U.S. 23, 44-46 (1963) (Harlan, J., concurring; fourth amendment unreasonable search and seizure). Of course, under the absorption approach, states are free to impose standards that are higher than the federal ones. *Cooper v. California*, 386 U.S. 58 (1967).

26. See *Schmerber v. California*, 384 U.S. 757 (1966) (by implication); *United States v. Wade*, 35 U.S.L. WEEK 4597, 4606-07 (U.S. June 12, 1967) (Black, J.,

So far as ultimate consequences are concerned, it appears that the Supreme Court's recent decisions in the field of constitutional criminal procedure have been pursuant to the "absorption" theory. Many of the Court's startling new decisions have thus been new only to the extent that limitations long placed on federal criminal proceedings and police activities are now being imposed on the states as well.

However, with each new imposition of a federal standard, state independence of action, important to the maintenance of a viable system of federalism, is cumulatively limited. Without doubt, the states are being restrained as never before with respect to the manner in which they may carry on police work and conduct criminal proceedings; concomitantly, the extent to which states may function as laboratories for social experiments in this area has been significantly curtailed. But the Justices are obviously aware that their decisions are compelling our society to relinquish much that is good. Just as obviously, they must believe that the price is more than made up in gain. The profit envisioned by them engages some of the fundamental postulates of our civilization and our notions of fairness and propriety. Before turning to some of the particular major recent developments and the values that they involve, it is appropriate to focus attention on the basic question of why, as individuals and as a society, we are or should be concerned with due process of law, particularly procedural due process, however defined. The question is likely rhetorical, for we all have some visceral sense that we should be concerned. If it is not rhetorical on this level, it should be — Dick Tracy and Little Orphan Annie to the contrary notwithstanding.

WHY DUE PROCESS?

To begin, we cherish and refine the safeguards that collectively add up to procedural due process of law to assure that the likelihood of convicting and punishing the innocent is minimized and to assure that truth is the main pursuit of criminal proceedings. For public confidence that, except for occasional and unavoidable mistakes, only the guilty are convicted and punished is essential to a free and democratic society.²⁷ As Justice Frankfurter said so well: "The history of liberty has largely been the history of observance of procedural safeguards."²⁸

dissenting in part and concurring in part and accusing the majority of having adopted an ordered liberty type of approach); *Stovall v. Denno*, 35 U.S.L. WEEK 4610, 4613 (U.S. June 12, 1967); *Id.* at 4614 (Black, J., dissenting); *cf.*, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965). It should be noted that there may be some merit to the recent observation of Dean Louis H. Pollak of the Yale Law School that:

[T]he doctrinal positions so heatedly espoused by the various Justices back in the late 1940s will become a largely academic exercise. The fit analogy will then become, as Professor Paul A. Freund once prophesied, the anecdote of the Irish cleric who was asked by a parishioner what the difference was between the cherubim and seraphim, and who answered, "I think that there was once a difference between them, but they have made it up."

2 POLLAK, *THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 179 (1966), quoting FREUND, *ON UNDERSTANDING THE SUPREME COURT* 43 (1950).

27. See BORCHARD, *CONVICTING THE INNOCENT* (1932); FRANK & FRANK, *NOT GUILTY* (1961).

28. *McNabb v. United States*, 318 U.S. 332, 347 (1943); or as Justice Brandeis put it, "[I]n the development of our liberty, insistence upon procedural regularity has

But some procedural safeguards, for example, the rule that illegally seized evidence is inadmissible in criminal proceedings,²⁹ often have the effect, so far as the defendant is concerned, of freeing the guilty rather than protecting the innocent from unwarranted conviction.³⁰ Sometimes the Supreme Court employs a procedural device to guarantee a more general substantive right to all the members of our society. Thus, illegally seized evidence is excluded from state as well as from federal criminal trials in order to preserve the general right of privacy — the freedom of each inhabitant of this country from unreasonable intrusion by the government into his home or person, which has been best described as “the right to be let alone.”³¹ And it is to be anticipated that further constitutional or other adjustment will be made in the near future to protect us from abusive wiretapping and electronic eavesdropping or surveillance, as well as from physical searches and seizures.³² Moreover, the Court’s recent actions in extending the fifth

been a large factor.” *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting). Speaking for the Court, Justice Fortas recently observed that:

Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise. As Mr. Justice Frankfurter has said: “The history of American freedom is, in no small measure, the history of procedure.” But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. “Procedure is to law what ‘scientific method’ is to science.” *In re Gault*, 87 S. Ct. 1428, 1439–40 (1967).

29. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

30. See, e.g., *Fahy v. Connecticut*, 375 U.S. 85 (1963).

31. *COOLEY, TORTS* 29 (2d ed. 1888); see Comment, 26 Md. L. Rev. 249 (1966). The Court has gone so far in this area as to overturn its 5 to 4 decision in *Frank v. Maryland*, 359 U.S. 360 (1959), which permitted the government to punish those who refuse to allow health inspectors to enter their homes without a warrant or a showing of probable cause. *Camara v. Municipal Court*, 35 U.S.L. WEEK 4517 (U.S. June 5, 1967); *Sea v. Seattle*, 35 U.S.L. WEEK 4522 (U.S. June 5, 1967), where the Court ruled that the fourth amendment bars warrantless, nonemergency inspections of residential and commercial premises by city health or fire inspectors without the occupant’s consent; but warrants for such inspections need not be based on reasonable cause to believe that there is a violation on the premises sought to be inspected; warrants can be based on the reasonableness of the health and safety need to conduct periodic, area-wide inspections. *But see Schmerber v. California*, 384 U.S. 757 (1966), where the Court, by a vote of 5 to 4, declined to overturn its earlier decision in *Breithaupt v. Abram*, 352 U.S. 432 (1957), which permits involuntary, but sanitary withdrawal of blood from the driver of an automobile involved in an accident when the police officer investigating has ample reason to believe that the driver was under the influence of alcohol. See *Warden, Maryland Penitentiary v. Hayden*, 87 S. Ct. 1642 (1967), where the Court overturned the rule that, in conducting a search, the police may not seize “mere evidence” as distinguished from contraband or fruits and instrumentalities of the crime.

32. See, e.g., *BENTON, THE PRIVACY INVADERS* 15–18, 151–71 (1964); *PACKARD, THE NAKED SOCIETY* chs. 4, 9 (1964). Long ago, in *Olmstead v. United States*, 277 U.S. 438 (1928), the Court ruled, 5 to 4, that wiretapping does not violate the fourth amendment. Section 605 of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1965), however, now renders telephonic wiretapping illegal (even when done pursuant to state law) if the intercepted communications are “divulged.” See, e.g., *Benanti v. United States*, 355 U.S. 96 (1957). In addition, recently the Supreme Court ruled that the use of spike-mikes and other such instruments that “trespass into a person’s home or habitat” violate the fourth amendment, and evidence

amendment's protection against self-incrimination,³³ and in imposing it upon the states, provide still another example of the use of a procedural limitation, designed not merely to protect the innocent but also to protect the integrity of our judicial system and of the individual in our society.³⁴

Although not directly related to the question "why due process?," it is noteworthy that in addition to the use of procedural devices to guarantee the right to privacy, there is a significant movement in the criminal law, partly under this privacy banner, to stake out entire areas of consensual and non-violent human conduct as being beyond criminal or other negative sanction by the government.³⁵ It is possible that these contractions of the criminal law are actuated, in addition, by a healthy recognition that law has only a limited function in any society and that it should condemn only forms of behavior which seriously endanger the social fabric. Of course, this may be just another way of saying that the law is more and more recognizing a right to privacy.

resulting from such intrusion must be excluded from criminal proceedings. See, e.g., *Silverman v. United States*, 365 U.S. 505 (1961).

Although it had the opportunity to do so during this Term, the Court has thus far declined to expressly overrule *Olmstead* and other such cases, for example, *Lopez v. United States*, 373 U.S. 427 (1963) and *On Lee v. United States*, 343 U.S. 747 (1952), which uphold the introduction of incriminating evidence resulting from the wiring of undercover agents and informers for sound. See *Hoffa v. United States*, 385 U.S. 293 (1966); *Osborn v. United States*, 385 U.S. 323 (1966). Very recently, however, the Court did rule that New York's *ex parte*, permissive eavesdropping statute was unconstitutionally broad and therefore violated the fourth and fourteenth amendments. The Court found the statute constitutionally deficient because it did not require, for the issuance of an eavesdropping order, particularity with respect to the crime suspected and the conversations sought and a showing of exigent circumstances to justify an unconsented to and secret eavesdropping by the police; nor did it sufficiently limit or control the period of the order's effectiveness by providing for a termination date of the order once the conversation sought was seized. "In short," the Court wrote, "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." *Berger v. New York*, 35 U.S.L. WEEK 4649, 4654 (U.S. June 12, 1967). In concurring, Justice Douglas stated that he joined "the opinion of the Court because at long last it overrules *sub silentio* *Olmstead v. United States* . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment." *Id.* at 4655. The Court has, moreover, granted certiorari in another case raising electronic eavesdropping issues. *Katz v. United States*, 386 U.S. 954 (1967). In addition, the Congress has before it the administration's Right to Privacy Bill of 1967, S. 928, 90th Cong., 1st Sess. (1967). Passage would likely lead to effective and salutary regulation of wiretapping and other electronic eavesdropping. One further development is worthy of note. The Draft Constitution, recommended by the Constitutional Convention Commission of Maryland, provides in Section 1.08 of the Declaration of Rights that: "*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral and other communications against unreasonable interceptions shall not be violated.*" INTERIM REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION: MARYLAND 1967 (May 26, 1967), pp. 2, 35-36 (emphasis supplied).

33. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). See also note 77 *infra*.

34. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966): "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulders the entire load.'" See also *In re Gault*, 87 S. Ct. 1428, 1454 (1967); GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955).

35. For a highly relevant discussion of the appropriate function of criminal law and its intersection with morals, see Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 786 (1966).

Thus, for example, the state of Connecticut was recently barred by the Supreme Court from prohibiting the operation of a Planned Parenthood Clinic that serviced married adults.³⁶ And the influential American Law Institute has, in its Model Penal Code, adopted the position that private sexual acts, whether heterosexual or homosexual, between consenting adults should be insulated from governmental interference.³⁷ One state, Illinois, has gone far to approach this position through legislation.³⁸

In one other significant fashion, the right to privacy is being further preserved of late. Under federal law, citizens are finding redress, in damages and injunctions, for aggravated invasions of their privacy by police and other public officials.³⁹ Very recently, in fact, as a result of a series of excessive and unconscionable searches of hundreds of homes and persons in Baltimore's Negro community (by a police department that was devoid of restraint in its quest for two suspected "cop-killers"), the Baltimore City Police Department was enjoined, in a far-reaching opinion by Judge Sobeloff, from conducting searches not based upon "probable cause."⁴⁰

The new tendency to make affirmative remedies available against police excesses illuminates another theme present in the current criminal law and procedure reform movement. This consideration might be labeled "how to police the police." The point is made most clear when we reconsider the Supreme Court's decisions that illegally seized evidence, evidence produced through an unreasonable search, is now excluded from state as well as from federal criminal proceedings.⁴¹ The Court rendered this decision despite the fact that it is advertent to the difficulty of ruling, as Justice Cardozo put it, that "the criminal is to go free because the constable has blundered."⁴² The Court was driven to this result because no other means of assuring the critical right to privacy against unwarranted or unreasonable police searches and seizures had proven effective. Furthermore, the Court was of the view that it is more than unseemly to permit the government to enforce the law by overt resort to admittedly illegal actions — and a search that is not conducted upon "probable cause"⁴³ is admitted by all to be illegal.⁴⁴

36. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Cf. *McLaughlin v. Florida*, 379 U.S. 184 (1964) (Florida law punishing interracial fornication with a heavier penalty than intraracial fornication voided); *Loving v. Virginia*, 35 U.S.L. WEEK 4679 (U.S. June 12, 1967) (Virginia anti-miscegenation law voided).

37. MODEL PENAL CODE art. 213 (Proposed Official Draft, 1962).

38. ILL. STAT. ANN. ch. 38, §§ 11-2, 11-3 (1961).

39. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961), involving 42 U.S.C. § 1983 (1965); *Dombroski v. Eastland*, 87 S. Ct. 1425 (1967).

40. *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966).

41. *Ker v. California*, 374 U.S. 23 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

42. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926).

43. The Supreme Court's present definition of probable cause appears to require that amount of evidence which would "warrant a man of reasonable caution" to believe that a felony had been committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925). While the "quantum" of information giving rise to probable cause will be "measured by the facts of the particular case," it must be more than a "vague suspicion." *Wong Sun v. United States*, 371 U.S. 471, 479, 484 (1963). See also *Warden, Maryland Penitentiary v. Hayden*, 87 S. Ct. 1642, 1645-46 (1967).

44. In 1949, the Supreme Court first ruled that "unreasonable searches and seizures" violate due process of law under the fourteenth amendment when conducted

Consider, if you will, the consequences of the government's own demonstrated contempt for law. Is one consequence not likely to be generalized contempt for law? Are the causes of our recent "long, hot summers" divorced from the Negro community's sensing that the police are unrestricted by law when dealing with ghetto-dwellers and Negroes? If government lawlessness is permitted, do we not risk the dangers Justice Brandeis warned of long ago when he said:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.⁴⁵

Upon this base, the need to foster respect for law, can be found support not only for much of our system of procedural due process, but also for the most sophisticated arguments favoring establishment of civilian police review boards. Who, indeed, is to police the police?⁴⁶

Related to the need for policing the police and for inculcating respect for law is the importance of having our systems of criminal law satisfy not merely the reality, but also the appearance, of fairness.⁴⁷ We must pause to absorb this thought, for many will find it at least initially shocking; yet it is deeply rooted in the fundamental

by state police officials. *Wolf v. Colorado*, 338 U.S. 25 (1949). It was not until 1961, however, that the Court ruled that the fruits of such searches must be excluded from state criminal proceedings. *Mapp v. Ohio*, 367 U.S. 643 (1961). Later the Court ruled that the same standards of excludability that are applicable in the federal courts are applicable in the state courts, *Ker v. California*, 374 U.S. 23 (1963), although a state is free to impose a higher standard of excludability if it chooses. See *Cooper v. California*, 386 U.S. 58 (1967). Still later it was held that the exclusionary rule is not to be retrospective in application. *Linkletter v. Walker*, 381 U.S. 618 (1965).

45. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

46. See generally Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Department*, 44 TEXAS L. REV. 939 (1966); Bickel, *Judicial Review of Police Methods in Law Enforcement: The Role of the Supreme Court of the United States*, 44 TEXAS L. REV. 954 (1966).

47. "There is a tremendous psychological need for the appearance of justice which a fair trial creates in the public mind." Arnold, *The Criminal Trial as a Symbol of Public Morality*, in CRIMINAL JUSTICE IN OUR TIME 137, 140 (Howard ed. 1965). See, e.g., *Offutt v. United States*, 348 U.S. 11, 14 (1954), where, dealing with judicial bias, Justice Frankfurter said: "Justice must satisfy the appearance of justice." See also *In re Gault*, 87 S. Ct. 1428, 1443 (1967).

premises of our pluralistic society, which accepts and understands the relativity of truth and, indeed, knows that truth may be illusion and illusion, truth.⁴⁸ Even in the criminal process (as in most of our institutions) the most important decisions we make, therefore, are those according to which we decide how to decide. And in structuring and operating the system, the quest for truth, or that which actually transpired on a particular occasion, is only one goal that we pursue. Among other things, we also seek public morality and expiation of our sins, much as we do in a passion play.⁴⁹ Confidence in the substance of the system is thus wedded to confidence in its appearance or illusion.⁵⁰ If this broader function is not served by a system of justice, to the satisfaction of the population it services, that system is overthrown as soon as time and power permit. The Black Panther Movement in the South may be seen, in part, as a frustrated reaction to the inability of Negroes in that section of the country to gain even the appearance of fairness in legal proceedings.

The importance of "maintaining appearances" and of symbolism in criminal procedure may be illustrated by our jury system. It is a truthseeking device, but it is also a hedge against the power or caprice of the official state and a petty legislature to assure the continual participation by the people and application of the public conscience in the administration of justice.⁵¹ Admittedly it is an imperfect instrument; surely this is true of its utility in ascertaining truth. Nevertheless, we tolerate, perhaps even adulate, the jury system despite its defects. The Supreme Court, in fact, recently indicated some preference for the jury system, even over judges, as fact finders in criminal contempt proceedings involving risk of serious penalty.⁵² Can it be that we consider the imperfections of jury trial to be its perfection?

In more primitive times, instead of trial by jury, the various truthseeking devices of trial by ordeal were employed.⁵³ If it were demonstrated that these devices were considerably more accurate in

48. See, *e.g.*, PIRANDELLO, *NAKED MASKS: FIVE PLAYS* (Bentley ed. 1952).

49. See generally Arnold, *op. cit. supra* note 47.

50. By this statement, disagreement is not necessarily intended with the view recently expressed by Justice Fortas with respect to prosecution concealment of information: "The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); see also *In re Gault*, 387 S. Ct. 1428, 1439-40 (1967) (quoted *supra* note 28).

51. *Cf.*, *e.g.*, Arnold, *op. cit. supra* note 47, at 143; Jackson, *The Lottery*, in *THE MAGIC OF SHIRLEY JACKSON* 137 (Hyman ed. 1966).

52. See *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *United States v. Barnett*, 376 U.S. 681 (1964). *Cf.* *Singer v. United States*, 380 U.S. 24 (1965) (upholding application of Fed. R. CRIM. P. 23(a) requiring government consent to defendant's waiver of jury trial). Recently the Court granted certiorari in a case raising the question of whether a defendant has a fourteenth amendment right to a jury trial on a state criminal contempt charge resulting in a two-year prison sentence. *Bloom v. Illinois*, 387 S. Ct. 1347 (1967).

53. See, *e.g.*, PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-15 (5th ed. 1956); II POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 598-99 (1923).

determining truth than is our jury system, we would nonetheless recoil from the proposal that the jury system, imperfect though it is, be replaced with trial by ordeal. Why? Because trial by ordeal is considered uncivilized or inhumane.

As has often been said, one of the marks of a civilization — one of the ways to test its maturity — is its system of criminal justice. We must therefore assume, and I think we all realize it, that absent the most egregious of circumstances, there are procedures that we shun, regardless of validity as truth-seeking devices, on the simple but complex ground that our society just should not, and therefore cannot, approve such activities. Thus, there are procedures that we do not institutionalize because they are inhumane; concomitantly, those procedures we do institutionalize must be responsive to a healthy sense of humanity. These limitations, first an overt and second an inarticulate command of civilization, have ramifications throughout our system of criminal justice; this is all the more understandably so because each individual, unless he represses or otherwise masks or ignores the insight, is able to project himself into the role of one who is called as accused before the bar of justice. Each of us hopes, I think, that if he were the accused, the government would be restrained from performing its will upon him, untrammelled by considerations of fairness and morality.⁵⁴

HASN'T SOCIETY ANY RIGHTS?

For all these worthy considerations of protecting the innocent, maintaining a free and pluralistic society, promoting respect for law, and acceding to the demands of humane civilization and enlightened self-interest, it appears to be a fact that crime is increasing and at an alarming rate,⁵⁵ and it is likely to continue increasing. Moreover, it cannot be ignored that to function properly and avoid anarchy or intolerable disorder, a society (and its systems of criminal justice) must not merely be humane and protective of the innocent, but must also protect itself and its members from the ravages of crime and lawlessness. Society must do a competent job of defining crime, of detecting and fighting it, and of restraining, isolating, deterring and/or rehabilitating criminals.⁵⁶ Obviously, therefore, society must provide for the orderly conviction of the guilty.

54. Compare the statement attributed by the recent play and motion picture, "A Man for All Seasons" to Sir Thomas More who, when he was being cajoled to arrest, without lawful cause, Richard Rich, ultimately the instrument of his undoing, said that he would even "give the Devil the benefit of law for my own safety's sake."

55. In the entire United States, major crimes (murder, robbery, rape, aggravated assault, burglary, larceny of \$50 or more, and auto theft) rose 37.7 per cent from 1959 through 1964. Computed from figures in U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 148 (1966). See generally THE CHALLENGE OF CRIME IN A FREE SOCIETY (Report by the President's Commission on Law Enforcement and Administration of Justice, 1967).

56. See generally INBAU, *Law Enforcement, the Courts, and Individual Civil Liberties*, in CRIMINAL JUSTICE IN OUR TIME 97 (Howard ed. 1965). Of course, there is one other traditional function of criminal law: retribution. But see *Rudolf v. Alabama*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, J.J., dissenting from the denial of certiorari).

There are those who argue that the current judicial tendency to refine and extend constitutional limitations and to impose them on state criminal proceedings promotes an increase in crime itself.⁵⁷ Such contentions are old hat, dubious old hat.⁵⁸ Even if the decisions of the past few years were overturned, little would be accomplished to assure a decrease in crime. As the President's Commission on Law Enforcement and Administration of Justice recently appreciated, the elimination of the root causes of crime, such as poverty and the general disorientation of the individual in our permissive and mass-nuclear age, and the improvement of police techniques and personnel are more relevant points upon which to focus social and intellectual energies.⁵⁹

Although the opponents of the new constitutional and other developments overstate their case, the proponents are not entirely innocent of this malady. Since the new decisions are new in their effect, notably on state practices and procedures, they are obviously disruptive, and the disruption is magnified by the Supreme Court's expansion in 1963 of the scope of collateral review available in federal courts on writs of habeas corpus brought by state prisoners, even well after their state convictions are final.⁶⁰ It must for all time be admitted that

57. See, e.g., INBAU, *op. cit. supra* note 56.

58. Kamisar, *When the Cops Were Not "Handcuffed,"* N.Y. Times, Nov. 7, 1965, p. 34 (Magazine).

59. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *op. cit. supra* note 55. See also Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF JUSTICE (1963); REPORT OF THE STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY UNDER THE ADMINISTRATION OF WILLIAM J. O'DONNELL AND CHARLES E. MOYLAN, JR. 3-8 (Jan. term 1964 to Jan. term 1965).

60. *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

The Court has recognized the problem and, despite criticism by many who approve the limitations now being placed on state criminal proceedings, (see, e.g., *Linkletter v. Walker*, 381 U.S. 618, 640 (1965) (Black and Douglas, J.J., dissenting)) has ameliorated the dislocation by applying some of its new decisions prospectively, thereby not reopening earlier final convictions.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court refused to apply retroactively its holding in *Mapp v. Ohio*, 367 U.S. 643 (1961), that illegally-seized evidence is not admissible in state criminal trials. The Court in *Linkletter* found that, since "the Constitution neither prohibits nor requires retrospective effect," the Court would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), the Court declined to apply retroactively its holding in *Griffin v. California*, 380 U.S. 609 (1965), that adverse comment on a defendant's failure to testify in a state criminal trial violates the privilege against self-incrimination. Taking the *Linkletter* guidelines as its "starting point," the Court in *Tehan* concluded that the fifth amendment privilege against self-incrimination is not "an adjunct to the ascertainment of truth," as opposed to the right to counsel or the exclusion of a coerced confession, which are inextricably bound up in the trial, the purpose of which is the "determination of truth." 381 U.S. at 416.

In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court refused to apply retroactively either its holding in *Escobedo v. Illinois*, 378 U.S. 478 (1964), that denial of counsel to an accused person who is no longer the object of a "general inquiry" but who has become the "particular suspect" violates the sixth and fourteenth amendments, or its holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), that, without adequate procedural safeguards, police interrogation after a person has been taken into custody and the introduction in evidence of any resulting statements violate the fifth amendment. The Court in *Johnson* declared that *Escobedo* and *Miranda* "encompass

it is not a wholly satisfactory answer to the critics of the new rulings to say that federal police agencies, such as the FBI, have long labored under many of the "new" constitutional disabilities without any discernible loss of effectiveness.⁶¹ Not only do the federal police agencies, particularly the FBI, have superior personnel, but, with the exception of the District of Columbia Police Department, they are not usually charged with the awesome burden of general law enforcement. Federal offenses are, in the main, pretty specialized and fancy affairs not involving the mundane work-a-day problems of general maintenance of social order. And federal police decisions ordinarily are not the kind of spur of the moment decisions that must be made daily by the patrolman on the beat. Despite the disruption of state practice and procedure, however, the new restrictions conform to our fundamental postulates and therefore are mostly beneficial. Moreover, if not avoided by low visibility subterfuge,⁶² they will require and/or contribute to desirable up-grading of police personnel and practices. As some of the more far-sighted state prosecutors have declared, unable to rely upon unsophisticated "knock-on-the-door" means of adducing evidence, the police will have to develop and refine sophisticated and scientific methods of criminal investigation.⁶³ Crude shortcuts have been ruled out.

THE ADVERSARY-ACCUSATORY SYSTEM⁶⁴

As already noted, the last few years can be described as spectacular to the extent that events have required alteration of past practices in criminal procedure, though not necessarily past theories. Among the more far-reaching of the recent developments have been those in the area of the right to legal counsel in criminal proceedings.

For several decades, all indigent criminal defendants accused of serious crimes have had the absolute right to effective representation by appointed counsel in federal court trials, unless they voluntarily,

situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." 384 U.S. at 730.

Most recently, in *Stovall v. Denno*, 35 U.S.L. WEEK 4610 (U.S. June 12, 1967), the Court ruled that its decisions in *United States v. Wade*, 35 U.S.L. WEEK 4597 (U.S. June 12, 1967) and *Gilbert v. California*, 35 U.S.L. WEEK 4614 (U.S. June 12, 1967), holding that a lineup is a critical stage in a criminal proceeding at which the right to a counsel attaches, are not to be applied retroactively. Retroactive review of the general fairness of the proceedings, however, was left open.

It is notable that the Court of Appeals of Maryland as well has declined to give retrospective application to its decision voiding convictions by juries from which non-theists have been systematically excluded. *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965); see Comment, 26 Md. L. REV. 272 (1966).

61. See generally, e.g., *INBAU*, *op. cit. supra* note 56, at 112.

62. Cf. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

63. See, e.g., *The Evening Sun*, June 14, 1966, p. B-30 (Reported comments of Baltimore City State's Attorney Charles E. Moylan, Jr., on *Miranda* and *Escobedo* decisions); REPORT OF THE STATE'S ATTORNEY'S OFFICE OF BALTIMORE CITY, *op. cit. supra* note 59, at 5 (implied). See U.S. Dep't of Justice Press Release, March 24, 1967. (Attorney General Ramsey Clark announced approval of \$603,315 in grants to 16 state and local criminal justice projects); U.S. Dep't of Justice Press Release, March 22, 1967 (fellowship grants for policemen under the Law Enforcement Assistance Program).

64. See generally KAMISAR, *Equal Justice in the Gatehouse and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1, 12-13 (1965).

knowingly, and intelligently waive the appointment.⁶⁵ In 1932, this requirement was first imposed in a state case involving capital punishment;⁶⁶ but it was not until 1963, in *Gideon v. Wainwright*,⁶⁷ that the Supreme Court held that each state criminal defendant charged with a *serious* crime, presumably defined as an offense subject to a significant penalty, has a constitutional right to appointed counsel, without regard to whether the circumstances in his case are so compelling as to render trial without legal counsel unfair. In the Supreme Court's judgment, availability of counsel is, as a matter of law, absolutely essential to the fairness of criminal proceedings.

There are several reasons why the Court came to this conclusion and therefore required extension of the right to counsel to state criminal proceedings of a serious nature. First, in the Court's view, the necessity for counsel springs from the essential characteristics of our legal system which, unlike some others, is adversary in structure. Basically, this means that parties to a dispute (in criminal cases, the state and the defendant) come into court and engage in the personal combat of probing and adducing the facts through examination and cross-examination of witnesses⁶⁸ and the introduction of real evidence under strict rules of admissibility. The system is structured so that it is, in a very real way, each man or combatant for himself. No magistrate sits, as in continental systems, to participate actively and to weight the scales for abstract truth and justice. By requiring the appointment of counsel for indigents, the Supreme Court has in effect recognized that the process is exceedingly complex and is highly dependent for its accuracy, and consequently both for its fairness and for its appearance of fairness, upon the availability to each of the contestants of trained and skilled experts or champions — lawyers — to press each side's case.

The second principle underlying and ultimately promoted by the right to counsel decisions is closely wedded to the first. Specifically, ours is an accusatory rather than an inquisitory system. Simply put, this means that the prosecution is charged with proving the criminal defendant guilty beyond a reasonable doubt without compelling the defendant to convict himself out of his own mouth.⁶⁹ As noted earlier, proof of guilt must be adduced in the course of proceedings during which all witnesses are subject to confrontation, including not only

65. See *Johnson v. Zerbst*, 304 U.S. 458 (1938).

66. *Powell v. Alabama*, 287 U.S. 45 (1932).

67. 372 U.S. 335 (1963).

68. Compare *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right to confrontation absorbed into the fourteenth amendment). Lately there has been some movement to ameliorate the purely competitive character of the adversary system. For example, the recent amendments to the Federal Rules of Criminal Procedure provide for increased discovery in criminal proceedings. See FED. R. CRIM. P. 16. As to the possibility that conditioning discovery of the government's case on discovery of the defendant's case may violate the privilege against self-incrimination, see 86 S. Ct. No. 11 (Supp.) p. 208 (Feb. 28, 1966) (Douglas, J., dissenting in part from the proposed rules for criminal procedure). See also Comment, 35 *FORDHAM L. REV.* 315 (1966).

69. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). See also note 77 *infra*.

direct, but also challenging cross-examination.⁷⁰ Unquestionably, effective examination of witnesses demands competent counsel. Thus, the Supreme Court has ruled that legal representation must be available at trial. And, to preserve further the integrity of the accusatory character of our system, the Court ruled in *Massiah v. United States* that after indictment, at which time formal proceedings are entered against him, an accused may not be interrogated by agents of the government, in the absence of his counsel.⁷¹ Then, to over-simplify, the Court also ruled in *Escobedo v. Illinois* that when the police "process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here [in the case the Court was then deciding], the accused must be permitted to consult with his lawyer."⁷² A confession or statement resulting from an interrogation in violation of this right was held to be inadmissible in a criminal proceeding against the accused. The last two rulings were made in cases in which the accused had already procured his own attorney and were specifically based on the sixth and fourteenth amendments' right to counsel.

Last year the Court pushed the lesson further, protecting indigents as well as those with retained counsel, by erecting the fifth amendment privilege against self-incrimination, in addition to the sixth amendment right to counsel, as a major barrier to the admissibility of statements that result from custodial interrogation. In the landmark case entitled *Miranda v. Arizona* the Court held that:⁷³

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any

70. See *Turner v. Louisiana*, 379 U.S. 466 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); see also *Greene v. McElroy*, 360 U.S. 474 (1959); 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

71. 377 U.S. 201 (1964); but cf. *Hoffa v. United States*, 385 U.S. 293 (1966); *Osborn v. United States*, 385 U.S. 323 (1966) (use of informers and introduction of evidence garnered by them prior to indictment not prohibited entirely).

72. 378 U.S. 478, 492 (1964).

73. 384 U.S. 436 (1966).

manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.⁷⁴

The Supreme Court rulings, it must be stressed, exclude an accused's confessions or statements from his trial without regard to veracity or reliability as evidence. In addition, the decisions could not have been made in ignorance of the possibility that many lawyers may still act in conformity to the view, expressed by Justice Jackson more than a decade ago, that "under our adversary system, he [a lawyer] deems that his sole duty is to protect his client — guilty or innocent — and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."⁷⁵ Despite the risks, the Court's rulings were made and were imposed upon the states in the interest of the values that underlie our adversary-accusatory system of criminal justice. And, more than that, or perhaps concomitantly, the *Miranda* decision in particular, which followed a long history of decisions excluding involuntary confessions,⁷⁶ was made because the Court agrees with Dean Griswold of the Harvard Law School that the privilege against self-incrimination is "one of the great landmarks in man's struggle to make himself civilized."⁷⁷

74. *Id.* at 444-45. To this passage, Chief Justice Warren dropped a footnote which said: "This [custodial interrogation] is what we meant in *Escobedo* where we spoke of an investigation which had focused on an accused," 384 U.S. at 444 n.4.

75. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). See also Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). The available evidence indicates, however, that despite *Miranda* there has as yet been no significant decrease in the number of confessions. Zion, "So They Don't Talk," N.Y. Times, August 21, 1966, § E (The News of the Week in Review) p. 13, col. 1. Moreover, it is notable that the *Miranda* decision has thus far not prevented the conviction of the *Miranda* defendants: see Time, March 3, 1967, p. 49.

76. See, e.g., *Davis v. North Carolina*, 384 U.S. 737 (1966); *Chambers v. Florida*, 309 U.S. 227, 237-40 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

77. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955). See also *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966) (quoted note 34 *supra*).

The recent ascendancy of the fifth amendment protection against self-incrimination is marked in numerous other ways, not directly related to the right to counsel, but worthy of passing comment here. First, a couple of years ago the Court decided that the privilege is imposed on the states as well as on the federal government and the same generous standards of protection are binding on the state and federal governments. *Malloy v. Hogan*, 378 U.S. 1 (1964). Second, it ruled that a grant of immunity made by either the federal or state government is binding upon the other government. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); see Comment, 20 RUTGERS L. REV. 336-49 (1966). Third, the Court held that the privilege prohibited comment on the fact that a defendant chose to exercise his right to decline to testify at his own trial. *Griffin v. California*, 380 U.S. 609 (1965). And obviously defendants often

A number of matters remain to be clarified under the *Miranda* and *Escobedo* decisions.⁷⁸ For example, all of the stages at which counsel is required have not yet been determined. In particular, it is not yet known, with great certainty, at what point a suspect is "arrested," thereby requiring that he be apprised of his rights and afforded the assistance of counsel, appointed if necessary.⁷⁹ Fortunately, on the other hand, the Court did a great deal to resolve a second series of questions,

decline to testify in order to avoid being subjected to the prosecution's probing cross-examination — either for fear of incriminating themselves or for fear that they will be impeached, for example, with their own prior criminal records. Fourth, on the same day that it decided *Miranda*, the Court announced that vitality continues in the principle that involuntary confessions (confessions that appear to have been physically or psychologically coerced as a matter of fact) are inadmissible and cannot be used in criminal proceedings against the one who made the confession. *Davis v. North Carolina*, 384 U.S. 737 (1966). Fifth, the Court invalidated procedures whereby contested confessions were brought to the attention of juries prior to final determination of their voluntariness. *Boles v. Stevenson*, 379 U.S. 43 (1964); *Jackson v. Denno*, 378 U.S. 368 (1964). Sixth, compulsory registration as a member of the Communist Party of the United States was prohibited as violative of the privilege against self-incrimination since knowing and active membership in the Communist Party is subject to criminal sanctions. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965). And the Court has decided to reconsider its earlier ruling upholding compulsory registration, as an incident to a taxing statute, of gamblers who are often violating state, local, or federal law. (The earlier decision is *United States v. Kahriger*, 345 U.S. 22 (1953)). See *Marchetti v. United States*, cert. granted, 385 U.S. 1000 (1967); *Grosso v. United States*, cert. granted, 385 U.S. 810 (1966). These cases were briefed and argued during the October Term, 1966. See 35 U.S.L. WEEK 3252 (U.S. Jan. 17-18, 1967). At the end of the Term, however, they were restored to the docket for reargument at the October Term, 1967. 35 U.S.L. WEEK 3436-37 (Nos. 38 & 181, U.S. June 12, 1967). Finally, during this past Term, the Court ruled that the privilege against self-incrimination, applicable to the states, "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Moreover, the Court also ruled that the disbarment of an attorney, based upon his refusal to testify and produce financial records before a state judicial inquiry into unethical practices, violated his privilege against self-incrimination. *Spevak v. Klein*, 385 U.S. 511 (1967). According to the Court, however, "Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach." *Id.* at 516 n.3.

In one respect the Court recently limited the possible scope of the privilege against self-incrimination. In particular, it has ruled that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ." It only reaches compulsion of "an accused's communications, whatever form they may take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . ." *Schmerber v. California*, 384 U.S. 757, 761, 763-64 (1966) (taking of an unconsented blood test from a suspected drunken driver does not violate the privilege); *United States v. Wade*, 35 U.S.L. WEEK 4597, 4598 (U.S. June 12, 1967) (requirement that a suspect appear and speak in a lineup does not violate the privilege); *Gilbert v. California*, 35 U.S.L. WEEK 4614, 4615 (U.S. June 12, 1967) (taking of handwriting exemplars from a suspect does not violate the privilege).

78. Generally unresolved, for example, is the question whether the fruits of a coerced confession or one in violation of the *Miranda* rule, as well as the confession itself, must be excluded from criminal proceedings. See *People v. Dilon*, 57 Cal. 2d 415, 309 P.2d 714 (1962) (exclusion of real evidence obtained as a result of a coerced confession).

79. See note 74 *supra*; see also, e.g., *United States v. Kauffman*, 35 U.S.L. WEEK 2497 (D. Hawaii, Feb. 2, 1967); *United States v. Knight*, 261 F. Supp. 843 (E.D. Pa. 1966); *United States v. Spinney*, 264 F. Supp. 774 (D. Mass. 1966); *United States v. Fiore*, 258 F. Supp. 435 (W.D. Pa. 1966); *People v. Colleran*, 35 U.S.L. WEEK 3540 (N.Y. Sup. Ct. March 13, 1967).

concerning whether a defendant is denied his fifth or sixth amendment rights, for example, by his forced appearance, in the absence of counsel, in a lineup during which he is compelled to speak. Declining to extend *Miranda*, the Court ruled that compulsion to appear and speak in a lineup does not violate the privilege against self-incrimination, nor does the taking of handwriting exemplars from a suspect.⁸⁰ The Court also held that the taking of handwriting exemplars is not a critical stage in the proceedings, at which the right to counsel attaches; but, building on *Escobedo*, which has an essence independent of *Miranda*, it did rule that a lineup is a critical stage at which the presence, assistance, and advice of counsel can be of significant use to the accused.⁸¹ Consequently, the Court held that the right to counsel attaches at the lineup stage of criminal proceedings and that identifications made at a lineup, during which an accused has not been afforded his right to counsel, are inadmissible at trial. In addition, when such a lineup has taken place, but evidence of identifications made at it are not introduced at trial, it must still be decided, on a case-by-case evaluation of all the circumstances, whether the defective lineup nevertheless tainted other identifications made or introduced at the trial.

EQUAL JUSTICE UNDER LAW

An additional principle that also bottoms the right to counsel decisions arises from the constitutional admonition that our governments must afford all individuals "the equal protection of the laws."⁸² It will be recalled that it was pursuant to this equality concept that the Supreme Court struck down government-supported racial discrimination⁸³ and articulated the fundamental doctrine of "one man-one vote."⁸⁴ Just as race and urban residence were declared to be

80. *United States v. Wade*, 35 U.S.L. WEEK 4597 (U.S. June 12, 1967); *Stovall v. Denno*, 35 U.S.L. WEEK 4610 (U.S. June 12, 1967); *Gilbert v. California*, 35 U.S.L. WEEK 4614 (U.S. June 12, 1967).

81. Cases cited, *supra* note 80. The rule is limited to prospective application. *Stovall v. Denno*, *supra* note 80; discussed *supra* note 60. The basis upon which the Court distinguishes between lineups and other information gathering processes is revealed in a paragraph in the *Wade* decision, where Justice Brennan, who delivered the opinion of the Court, wrote:

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different — for Sixth Amendment purposes — from various other preparatory steps, such as systematized or scientific analyses of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial. 35 U.S.L. WEEK at 4600.

82. U.S. CONST. amend. XIV. See generally Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205 (1964).

83. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

84. *Reynolds v. Sims*, 377 U.S. 533 (1964).

invalid criteria upon which to make many distinctions, the Supreme Court's ruling that indigents are constitutionally entitled to appointed counsel is rooted partially in the judgment that it is invidious discrimination to permit a man to be tried without the legal representation so critical to his defense, merely because he is poor. Although implied in the basic right to counsel case, *Gideon v. Wainwright*,⁸⁵ this principle was made more overt in a case decided the same day in 1963, where the Court ruled that on the first appeal from criminal convictions the state must make counsel available to all indigents.⁸⁶ In addition, in an earlier case, one decided in 1956, the Court also ruled, on equal protection grounds, that indigents appealing from criminal convictions must be provided trial transcripts at state expense, at least where allegations that manifest errors occurred at trial are not denied.⁸⁷ And indigent access to proceedings for collateral attack on sentences of conviction has also been required.⁸⁸

In the near future, we can expect considerably further refinement of the extent to which the law, particularly in criminal proceedings, must assure even-handed treatment of rich and poor alike. For example, it remains to be decided in precisely what kinds of cases appointment of counsel is required.⁸⁹ Also to be more fully resolved is the question of what other services must be made available to indigent criminal defendants. Investigators? Psychiatrists? Scientific experts? Standards of indigency must also be worked out. How poor must a man be? How are we to avoid free-loaders? Under the pressure of the right to counsel decisions, increased attention will also have to be paid to questions of adequacy of counsel.⁹⁰ Some way must be found to assure

85. 372 U.S. 335 (1963).

86. *Douglas v. California*, 372 U.S. 353 (1963); see also, e.g., *Anders v. California*, 372 U.S. 1338 (1963); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Hardy v. United States*, 375 U.S. 277 (1964).

87. *Griffin v. Illinois*, 351 U.S. 12 (1956); see also, e.g., *Entsminger v. Iowa*, 376 U.S. 1442 (1964); *Draper v. Washington*, 372 U.S. 487 (1963); *Norvell v. Illinois*, 373 U.S. 420 (1963).

88. *Nowakowski v. Maroney*, 376 U.S. 1197 (1964); *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

89. Over dissent, the Supreme Court recently denied certiorari in two misdemeanor cases in which appointment of counsel had been denied. *Winters v. Beck*, 385 U.S. 907 (1966); *DeJoseph v. Connecticut*, 385 U.S. 982 (1966). See also *People v. Hamilton*, 271 N.Y.S.2d 694 (1966) (right to counsel upheld in probation violation proceedings); *Mempa v. Rhay* and *Walkling v. Rhay*, 386 U.S. 907 (1967) (*cert. granted*, appointment of counsel had been denied in probation proceedings); *State v. Snyder*, 180 Neb. 787, 146 N.W.2d 67 (1966) (defendant not entitled to presence of counsel at psychiatric examination); *Harris v. Ogilvie*, 35 Ill. 2d 512, 221 N.E.2d 265 (1966) (right to counsel upheld in habeas corpus proceeding brought pursuant to Uniform Criminal Extradition Act); *Nichols v. State*, 425 P.2d 247 (Alaska 1967) (same); *La Clair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967) ("appointment of counsel for indigents in habeas corpus and section 2255 proceedings rests in the sound discretion of district courts unless denial would result in fundamental unfairness impinging on due process rights"). New York has gone particularly far in requiring appointment of counsel. See, e.g., *People v. Witek*, 15 N.Y.2d 392, 207 N.E.2d 358 (1965) (theft of two dollars worth of apples from an orchard — fifty days imprisonment).

90. See, e.g., *Martin v. Virginia*, 365 F.2d 549, 552 (4th Cir. 1966) ("... a lawyer's duty in representing a person charged with crime may not be discharged perfunctorily or mechanically"); *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289 (1964); Comment, 39 WASH. L. REV. 819 (1964); Comment, 20 Sw. L.J. 136 (1966); Comment, 49 VA. L. REV. 1531 (1963).

that indigents have been adequately represented, while simultaneously avoiding the promotion of a burdensome boiler plate contention to be made in all post-conviction challenges. Some of these questions will be resolved, and new questions will arise while our society continues, for example, as under the Federal Criminal Justice Act of 1964,⁹¹ to attempt to provide for adequate legal representation of indigents by developing systems of public defenders or of compensation for private counsel, in order to reduce the tremendous burden of representing the poor that heretofore has been borne primarily by unremunerated individual attorneys. The equal protection revolution in criminal proceedings has already given rise to intensive re-examination of our bail system,⁹² with the passage of the Federal Bail Reform Act of 1966⁹³ and a proliferation of programs, in Baltimore among other cities, to administer wholesale release of accused persons on their own recognizance pending trial. Moreover, the equality revolution has already spread from the criminal arena into the realm of general legal services for the poor; for one important aspect of the War on Poverty is, as we lawyers must know, the establishment of programs to render legal services more accessible to the poor.⁹⁴

FURTHER AREAS FOR DEVELOPMENT

Many other developments will continue or begin, assuring the fairness and efficacy of our systems of criminal law within our society's fundamental value structure. Notably, the Court this Term ruled that the sixth amendment guarantee of a speedy trial is applicable to the states.⁹⁵ In addition, the question whether the fourteenth amendment has absorbed the fifth amendment's prohibition against trying a person more than once for the same offense, thereby protecting individuals from being worn-down by the state, is likely to be reconsidered soon.⁹⁶

91. 18 U.S.C. § 3006A (1965).

92. See, e.g., Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965); Part II, 113 U. PA. L. REV. 1125 (1965).

93. U.S. PUB. L. 465, 89th Cong., 2d Sess., June 22, 1966. Efforts are also being made to alter practices of jury selection so they may be more representative, racially, economically, and socially, of the entire community. See, e.g., Title I of the proposed Civil Rights Act of 1966, S. 3296, 89th Cong., 2d Sess., introduced April 28, 1966; H.R. 14765, 89th Cong., 2d Sess., introduced May 2, 1966. New bills containing jury provisions have been introduced in the present Congress. See Title I, S. 1026, 90th Cong., 1st Sess. (Feb. 20, 1967); Title I, H.R. 5700, 90th Cong., 1st Sess. (Feb. 20, 1967).

94. See Derby, *Public Legal Assistance in Baltimore City*, 26 MD. L. REV. 328 (1966).

95. *Klopper v. North Carolina*, 386 U.S. 213 (1967). The Court has also granted certiorari in a case raising a question of whether the states must afford trial by jury in criminal cases. *Bloom v. Illinois*, 87 S. Ct. 1347 (1967).

96. Compare *State v. Farmer*, 48 N.J. 145, 224 A.2d 481 (1966) (the fourteenth amendment absorbs the double jeopardy prohibition), with *Commonwealth v. Kubacki*, 208 Pa. Super. 523, 224 A.2d 80 (1966) (the fourteenth amendment does not absorb the double jeopardy prohibition). During this Term, the Supreme Court heard argument on whether the non-absorption rule, which dates back to *Palko v. Connecticut*, 302 U.S. 319 (1937), should be overturned. The Court, however, found that the issue was not properly raised in the case. *Cichos v. Indiana*, 385 U.S. 76 (1966). If the Court were to decide that the bar on double jeopardy applies to the states, it might then

And the Court may soon pass on the constitutionality of the so-called "stop and frisk" laws and practices.⁹⁷

Further elaboration can also be expected of the eighth amendment's prohibition against cruel and unusual punishment. Recently this prohibition was ruled applicable to the states in a decision that the status of narcotics addiction, which the Supreme Court defined as a disease, is not sanctionable as a crime.⁹⁸ Two United States Courts of Appeals have extended that ruling to insulate the status of habitual alcoholism from criminal sanction.⁹⁹ Not only has the prohibition against cruel and unusual punishment recently been used to bar punishment for acts declared not to be subject to criminal punishment, but there are indications that renewed evaluation will be made of the kinds and caliber of punishment that may be available for imposition against unquestionably "criminal" acts. Three Justices of the Supreme Court have in fact indicated their desire to consider whether capital punishment may be imposed with respect to offenses in which there is no loss of or threat to human life.¹⁰⁰ In addition, there is an increased movement in the direction of assuring consistency and other fairness in sentencing, with the increased possibility that, where appropriate, provision will be made for appellate review of sentencing.¹⁰¹

reconsider its decisions that acquittal (or conviction) by a state government does not bar the federal government from trying a defendant for essentially the same offense and vice-versa. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). It is perhaps notable that the Draft Constitution, recommended by the Constitutional Convention Commission of Maryland, includes in Section 1.10 of the Declaration of Rights a prohibition against double jeopardy, whereas Maryland's current Constitution includes no such prohibition. INTERIM REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION: MARYLAND 1967 (May 26, 1967) pp. 2, 38.

97. *Terry v. Ohio*, cert. granted, 35 U.S.L. WEEK 3419 (U.S. No. 1161, May 29, 1967); *Peters v. New York*, prob. juris. noted, 87 S. Ct. 1291 (1967); *Sibron v. New York*, prob. juris. noted, 386 U.S. 954 (1967); *Wainwright v. New Orleans*, cert. granted, 385 U.S. 1001 (1967).

98. *Robinson v. California*, 370 U.S. 660 (1962).

99. *Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966) (alcoholism, according to Judge Fahy, is a sickness accompanied by loss of "self-control," which is "an essential element of criminality, where personal conduct is involved. . ."); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966) (alcoholism). But the Supreme Court, over dissent, recently refused to review a decision contrary to those in the District of Columbia and Fourth Circuits. *Budd v. California*, 385 U.S. 909 (1966).

100. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, J.J., dissenting from the denial of certiorari). Notably, at its last session, the Maryland Senate passed a bill abolishing capital punishment in most cases. The bill, however, died in the House of Delegates. See Md. Sen. Bill No. 82, Jan. 24, 1967. It is also significant that the American Civil Liberties Union has within the last couple of years adopted the position that capital punishment is an unconstitutional deprivation of civil liberties. Furthermore, federal district courts in California and Florida have stayed all executions in those states pending adjudication of the cruel and unusual punishment and due process questions. See N.Y. Times, July 11, 1967, p. 20, col. 1. See THE POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, No. 222 (June, 1966). As to cruel and unusual punishment generally, recently Dean Pollak wisely observed, "There can be no doubt that the questions posed by Justice Goldberg [in *Rudolph*], and cognate questions testing whether 'the punishment fits the crime' will come before the Court with greater frequency and greater urgency in future cases. Those future cases will, one by one, give further dimension to the unfolding concept of due process of law." 11 POLLAK (ed.), THE CONSTITUTION AND THE SUPREME COURT 179 (1966); see also McWilliams, *Cruel and Unusual Punishments: Use and Misuse of the Eighth Amendment*, 53 A.B.A.J. 451 (1967).

101. See MD. CODE ANN. art. 26, §§ 132-38 (1957); see also, e.g., STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Tent. Draft, ABA Project on

Criminal punishment of insane persons has long been considered either to be cruel and unusual punishment or to be violative of due process of law.¹⁰² Extensive re-examination, however, is being made of the traditional tests of insanity, with the movement away from the old *M'Naghten* right and wrong test (even as modified by the irresistible impulse concept) in the direction of a more liberal notion of what constitutes insanity or mental incapacity.¹⁰³ The rise of the revolutionary *Durham* test,¹⁰⁴ which immunizes from criminal punishment conduct that was proximately contributed to by some mental defect or aberration, however, may be over. The movement now is more toward the ALI test,¹⁰⁵ which in subtle fashion is not quite as expandable as the *Durham* test and therefore holds the individual more responsible for his acts.¹⁰⁶ The ALI test basically asks the question, did the accused suffer mental incapacity, and, because of it, was he substantially unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law?

While the restructuring of the test of insanity continues, we are also witnessing a re-examination of the alternatives that have developed over the years to incarceration and punishment of harmful persons as criminals. Specifically, the question is mooted: Are systems of involuntary treatment and detention that are described as civil and/or medical really different from systems of involuntary treatment that are labeled "criminal"?¹⁰⁷ Recently, the entire notion of distinguishing

Minimum Standards for Criminal Justice, Inst. of Judicial Admin., April, 1967); *Appellate Review of Sentences: A Symposium at the Judicial Conference of United States Court of Appeals for the second Circuit*, 32 F.R.D. 249 (1962); Sobeloff, *A Recommendation for Appellate Review of Criminal Sentences*, 21 BROOKLYN L. REV. 2 (1955); Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A.J. 13 (1955). Cf. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). Very recently the United States Senate passed and sent to the House an appellate review bill.

102. See, e.g., *Robinson v. California*, 370 U.S. 660, 668-69 (1962) (Douglas, J., concurring); *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966); *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965) ("... the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to age or mental condition he is not responsible for those acts"). Recently the Supreme Court went so far as to rule that a state court must sua sponte protect an accused from being tried while legally incompetent. *Pate v. Robinson*, 383 U.S. 375 (1966).

103. Recently in *Pierce v. Turner*, cert. denied, 386 U.S. 947 (1967), Justice Douglas in dissent propounded a series of questions implying some doubt as to the constitutionality of the *M'Naghten* test.

104. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1957). "It [the rule] is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

105. MODEL PENAL CODE § 4.01 (1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." The A.L.I. test has been adopted in several jurisdictions. See, e.g., *United States v. Freeman*, 357 F. 2d 606, 622 (2d Cir. 1966). Recently, a bill providing for adoption was enacted by the Maryland legislature and signed by the Governor. House Bill No. 15, § 9(a), 1967.

106. Even the progressive United States Court of Appeals for the District of Columbia Circuit has moved in this direction, edging away from its *Durham* ruling. See, e.g., *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965).

107. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); Goldstein and Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853 (1963).

the incarcerated "treatment" of juveniles, "defective delinquents," and the insane, who have committed criminal offenses, from "punishment" of such persons as criminals has been sharply challenged.¹⁰⁸ At a minimum, the debate is resulting in increased and salutary application of constitutional safeguards to proceedings in which such status is determined or continued.

At the end of the October, 1966 Term, in fact, the Supreme Court ruled that the requirements of due process of law must be available in any proceeding in which an accused may be adjudicated, and committed as, a juvenile delinquent.¹⁰⁹ In the case before it, the Court had no occasion to decide whether all of the procedural safeguards normally associated with our notions of due process of law must be made available to the accused in such proceedings. Without necessarily exhausting the range of likely protections, it did hold that the accused is entitled to: adequate notice of the charges against him; notification of his right to counsel and, if necessary, the appointment of counsel; the protection of the privilege against self-incrimination; and the right to confront and cross-examine adverse witnesses. It is especially important to note that the Court carefully limited the scope of its decision. As Justice Fortas wrote for the Court:

We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.

There is nothing in the Court's decision or opinion to indicate that, when not actually involved in the determination-commitment stages of juvenile proceedings, the states may not apply the more flexible and informal procedures that may be believed to be consistent with the philosophy that in juvenile proceedings, to be distinguished from

108. In Maryland, for example, the constitutionality of the Patuxent Institution (where "defective delinquents" are incarcerated and treated) is being litigated in the state and federal courts. See *Daniels v. Director of Patuxent Institution*, 238 Md. 80, 206 A.2d 726 (1965), *after remand*, 243 Md. 16, 221 A.2d 397 (1966); *Murel v. Director of Patuxent Institution*, 240 Md. 258, 213 A.2d 576 (1965); *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964).

109. *In re Gault*, 87 S. Ct. 1428, 1436 (1967); see also *Kent v. United States*, 383 U.S. 541 (1966) (District of Columbia law interpreted to require similar safeguards); *Specht v. Patterson*, 87 S. Ct. 1209 (1967) (due process, including right to counsel, required at a hearing in which whether a sex offender is to receive an indeterminate sentence under a Sex Offender Law rather than a specific term prescribed for the offense committed is the issue).

criminal proceedings, the state's benevolent and paternalistic purpose is to pursue that which is for the good of the child. However, if the states presume to premise their juvenile delinquency systems on "treatment" rather than "punishment," it is possible that the courts may require that they do, in fact, "treat" their charges. The United States Court of Appeals for the District of Columbia has ruled that a person involuntarily detained in a psychiatric hospital as a consequence of a criminal proceeding can sue for an order that he in fact be treated.¹¹⁰

FREE PRESS V. FAIR TRIAL

One additional area of activity is worth particular note. Heroic efforts have been undertaken of late to accommodate the conflicts that arise between our basic constitutional requirement that each criminal defendant be afforded a fair trial before an unbiased jury (or judge) and our equally important constitutional guarantee of the broadest possible freedom of speech and press, both to assure public information and to assure the integrity of legal proceedings. The extent to which these fundamental guarantees sometimes clash was made all too clear during the days that followed the assassination of President Kennedy. While the press was more than satisfying the public's legitimate desire to know what was going on, it may have destroyed all chance that either Lee Harvey Oswald or Jack Ruby had for fair trials, if this entails trial before a jury comprised of individuals who have not predetermined the issues in the case. The Supreme Court has in fact ruled that convictions may not stand where an inflamed press or mass media has rendered improbable the securing of an unbiased jury, a jury that can review the evidence adduced at the trial reasonably free from preconceived judgment.¹¹¹ And the Court has also ruled that the conspicuous presence of television and other broadcasting equipment at the trial of Billy Sol Estes unconstitutionally interfered with the fair conduct of his trial.¹¹² On the other hand, however, the Court has persistently declined to permit any direct government bridling, in the interest of fair trial, of out-of-court press activities. In particular, the Court has not allowed injunctions or contempt citations to lie against out-of-court publications or utterances.¹¹³ But a bill was introduced in the 89th Congress which would make it "contempt of [federal] court for any

110. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); see also *Lake v. Cameron*, 364 F.2d 451 (D.C. Cir. 1966). Efforts are also being made to seal a significant loophole in the federal criminal law and to provide for civil commitment and treatment of criminal defendants acquitted in federal court on the grounds of "insanity." See S. 3573, 89th Cong., 2d Sess., introduced by its sponsor, Senator Tydings, on August 23, 1966; Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131 (1967).

111. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

112. *Estes v. Texas*, 381 U.S. 532 (1965); see also *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

113. See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending criminal litigation, except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than \$1000."¹¹⁴ In 1965, the Attorney General issued regulations of a similar tenor to govern the activities of employees of the Justice Department.¹¹⁵ The Highest Court of New Jersey has exercised similar restraint over both prosecution and defense attorneys, who are subject to the Court's supervision and sanction as officers of the court,¹¹⁶ and numerous other states have undertaken some form of regulatory action.¹¹⁷ Under the New Jersey approach, on pain of disciplinary proceedings, attorneys, both prosecution and defense, are prohibited from discussing pending criminal cases with reporters; prosecution lawyers are expected to exercise control over divulgement by police officials.

While these efforts to control the Bar will be helpful, a satisfactory resolution of the conflicts between a free press and fair trials depends upon regulation of the Fourth Estate as well. Sadly, however, there is little indication that the reporting media will also exercise adequate self-restraint,¹¹⁸ just as there appears to be little likelihood that the motion picture and television industries will engage in adequate self-regulation to restrict the output of the brutal and too starkly realistic sado-masochistic junk with which we (and most disturbingly our children) have been deluged for too many years. If we are treated to many more press spectacles such as those following President Kennedy's assassination and the murder of Dr. Sheppard's first wife, although not very likely, the Supreme Court might be constrained to permit direct suppression of such prejudicial press coverage of criminal proceedings,¹¹⁹ just as it recently indicated that government regulation of blatant sexual sado-masochism may be permissible.¹²⁰

114. S. 290, 89th Cong., 1st Sess. (1965).

115. 28 C.F.R. § 50.2 (Jan. 1, 1967).

116. *State v. Van Dyne*, 43 N.J. 368, 204 A.2d 841 (1964).

117. See, e.g., *FREE PRESS AND FAIR TRIAL* 95-119 (American Newspaper Publishers Ass'n, Special Committee on Free Press and Fair Trial, 1967).

118. Compare *FREE PRESS AND FAIR TRIAL*, *op. cit. supra* note 117 (study by the newspaper lobby), with *STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS* (Tentative Draft of the American Bar Ass'n Project on Minimum Standards for Criminal Justice, 1967) and *FREEDOM OF THE PRESS AND FAIR TRIAL* (Final Report with Recommendations by the Special Commission on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, 1967); see also the flurry over ground rules for the coverage of the trial of Richard Speck, recently convicted of mass murder. *E.g.*, N.Y. Times, Feb. 18, 1967, p. 23, col. 6.

119. Compare *STANDARDS RELATING TO FREE PRESS AND FAIR TRIAL*, *supra* note 118. In England, of course, the press labors under direct government restriction with respect to reporting of criminal proceedings. See, e.g., Groggin and Hanover, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform*, 38 So. CAL. L. REV. 672 (1965).

120. See *Mishkin v. New York*, 383 U.S. 502 (1966); see also *Ginzburg v. United States*, 383 U.S. 463 (1966), *but see Redrup v. New York*, 87 S. Ct. 1414

CONCLUSION

The development of an appropriate accommodation between the principles of fair trial and of free speech will be interesting to observe, particularly since it and the other developments touched upon earlier will give us further insight into the interplay between the various institutions in our society and between our Constitution and the fundamental values that continue to evolve in our complex civilization. The processes we have brushed are indeed complicated, for in our age of almost inconceivable flux and change, to address the topic of this article is, in a fundamental sense, to ask and to face the questions: where is our society; what are its characteristics; where is it going; where has it been? The at first startling developments in the area of criminal law and procedure to which the processes of interaction have given rise in scarcely a decade are typical, not atypical; they involve and embody the continual growth and rejuvenation of principle in our maturing and urbanizing society. Moreover, they involve the primary use of the law, including constitutional law, as the main battle field upon which are resolved a progressive society's twin needs for stability and change.

On balance, there is much to approve of in the contemporary winds and currents in criminal law and procedure. By accepting and following through on them, we may be paying a price in loss of continuity with past practices and in reduction of the diversity through experimentation that might come from cleaving closer to a theoretical model of federalism. But the change that we accomplish, with its inexorable movement toward uniformity, is more than worth the cost. The uniformity we approach is that of a maturing and humane civilization, committed to the essentiality of the individual, to his integrity, and to an order based upon notions of fairness and decency.

It is not amiss in closing to suggest, however, that in the area of criminal procedure at least, far-reaching change may be expected to come more slowly or less dramatically now than in the past decade or so.¹²¹ Most of the central decisions, indicating the main directions

(1967); *Holden v. Blankenship*, 87 S. Ct. 1418 (1967); *Blankenship v. Holden*, 87 S. Ct. 1419 (1967).

121. Compare Clymer, *High Court in Low Gear in Field Criminal Law*, The Sun (Baltimore), Feb. 24, 1967, p. A6, col. 2. In one realm, generally outside of the scope of this article, but having enormous consequences for our system of federalism, we can still expect spectacular and accelerating change. Whether to fight organized crime or to protect civil rights, the federal government is likely to intervene increasingly to establish federal substantive criminal law where, in the past, state law stood alone. See, e.g., 18 U.S.C. § 1952 (1965) (interstate travel or transportation in aid of racketeering enterprises); *Senate Judiciary Committee Hearings, The Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess. (1961); *Hearings Before Subcommittee No. 5, House Judiciary Committee, Legislation Relating to Organized Crime, Serial No. 16*, 87th Cong., 1st Sess. (1961); *Hearings Before the Subcommittee on Criminal Laws and Procedure, Senate Judiciary Committee*, 89th Cong., 2d Sess. (1966). Title V of the proposed (but not passed) Civil Rights Act of 1966 (S. 3296, 89th Cong., 2d Sess., introduced April 28, 1966; H.R. 14765, 89th Cong., 2d Sess., introduced May 2, 1966); Title V of the proposed Civil Rights Act of 1967; S. 1026 and H.R. 5700, 90th Cong., 1st Sess., introduced Feb. 20, 1967.

for development (those, for example, involving right to counsel, search and seizure, self-incrimination, and equality of access to criminal justice) have already been made and are unlikely to be reversed.¹²² Great and important decisions are still to come, but the changes, particularly those wrought by courts, of the immediate future are likely to involve primarily projection, consolidation, and refinement of principles already well-announced. By its recent actions, the Supreme Court has set in motion a kind of revolution, one that it now has carried about as far as it can. Other institutions, however, such as the American Bar Association, with its project to establish minimum standards for criminal justice, and the President's Commission on Law Enforcement and Administration of Justice, are taking up the call, as they must, and pressing on.

122. We cannot, I suppose, ignore the possibility, not great at this time, that the Court might go beyond *Miranda* and *Escobedo* and simply exclude all out-of-court confessions. See *Garrity v. New Jersey*, 385 U.S. 493, 498-99 n.5 (1967).